JAN 19 1976

IN THE

Supreme Court of the United States

1976 Term

No. 75-1025

FATHER VINCENT LA ROCCA, of Counsel to
WILLIAM GALLAGHER, Attorney-In-Charge,
The Legal Aid Society, Criminal Defense Division,

Petitioner,

v.

HON. MORGAN LANE, Judge of the Criminal Court
of the City of New York,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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To: *The Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:*

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered on October 23, 1975, which, with one dissent, affirmed a judgment of the Supreme Court of the State of New York, Appellate Division, Second Department, which, with one dissent, reversed

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a decision of the Supreme Court of the State of New York, Kings County, Criminal Term, prohibiting respondent, a Judge of the Criminal Court of the City of New York, from requiring petitioner to remove his normal clerical garb, including the Roman collar, prior to continuing as defense counsel in a criminal jury trial.

Opinions Below

The opinion of the New York Court of Appeals (Appendix A) is officially reported at 37 N.Y.2d 575 (1975). The opinion of the Appellate Division, Second Department (Appendix B), is officially reported at 47 A.D.2d 243. The opinion of the Supreme Court, Kings County, Criminal Term (Appendix C), is officially reported at 77 Misc.2d 123.

Jurisdiction

The judgment of the Court of Appeals was entered on October 23, 1975. No application for an extension of time to file this petition has been made. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3) (1970).

Questions Presented

Does a state violate the establishment, free exercise and free expression clauses of the First Amendment to the United States Constitution by denying a Roman Catholic priest-attorney the right to appear as defense counsel in a criminal jury trial dressed in his normal clerical garb, including the Roman collar?

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Does a state violate the defendant's right to assistance of counsel and the concomitant rights to a fair trial and to due process of law under the Fifth and Sixth Amendments of the United States Constitution by removing the defendant's counsel, a Roman Catholic priest-attorney solely due to a refusal by the defense counsel to remove his Roman collar?

Constitutional Provisions Involved

First Amendment, United States Constitution:

> "Congress shall make no law respecting the establishment of religion, or the free exercise thereof; or abridging the freedom of speech . . .".

Fifth Amendment, United States Constitution:

> ". . . nor be deprived of life, liberty, or property, without due process of law . . .".

Sixth Amendment, United States Constitution:

> "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."

Fourteenth Amendment, United States Constitution:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law . . .".

Statement of the Case

Petitioner, Father Vincent La Rocca, is a validly ordained Roman Catholic priest and has been so ordained for a period of over twenty-five years. He was duly admitted to practice as an attorney-at-law in the State of New York in 1973 and is employed by the Brooklyn Crim-

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inal Court Office of the Legal Aid Society's Criminal Defense Division. While pursuing his application for admission to the Bar and in all appearances before the courts of the State of New York subsequent to his admission, Father La Rocca has appeared in the traditional clerical garb of a Roman Catholic priest, which includes the Roman collar. His actions in so attiring himself have been in accordance with the instructions of his religious superiors.

Father La Rocca was assigned by the Legal Aid Society to represent Cecelia Daniels, charged with a misdemeanor assault and related charges, in the case of *People* v. *Daniels* to be tried before a jury panel. Father La Rocca had appeared before the Criminal Court of Kings County as defense counsel for more than one year in his priestly attire in non-jury matters prior to his assignment to the *Daniels* case. Father La Rocca had appeared with his collar before Judge Morgan Lane, the very judge who refused to allow Father La Rocca to proceed in the *Daniels* case, on a number of occasions prior thereto on non-jury matters. When, on January 4, 1974, Father La Rocca appeared before Judge Lane in the *Daniels* case, the judge, alluding to possible prejudice of the jury, directed Father La Rocca not to participate as defense counsel while wearing his clerical attire. During the course of the colloquy among Father La Rocca, Judge Lane and Mr. Penofsky, the Assistant District Attorney, Father La Rocca explained his actions in wearing his priestly garb:

> "Mr. Penofsky: . . . I know of no rule that necessitates that a Roman Catholic Priest must at all times wear his particular Roman Catholic garb.
>
> "Father La Rocca: May I respond to that?
>
> "The Court: Yes.

> "Father La Rocca: The Bishop McGovery of this Diocese, he has specifically designated I appear in Court as a Catholic Priest wearing the collar and garb of a Priest and live with the Clergy. He is a determinant of the conduct of his Priests by Canonical Law..."

Judge Lane's direction was issued prior to the commencement of jury selection. Father La Rocca respectfully refused to remove his collar, stating that he had been admitted to the Bar in the same attire and that such a ruling infringed on his client's Fifth and Sixth Amendment rights as well as his own First Amendment rights. Prior to Judge Lane's ruling, Father La Rocca specifically stated the following:

> "... We pose to the objections of the District Attorney, my own First Amendment rights. My Priesthood has extended over 25 years. I attended law school under the Roman Collar as a Catholic Priest. . . . I further resent the fact that we are dealing with Fifth and Sixth Amendment rights here; Those of my client, who has steadfastly clung to the determination that I be her representing counsel. My own First Amendment rights, I reiterate. It would seem to me that the criminal procedure has developed in New York State and in the States of the United States over a great many years. The criminal procedure, in saying, provides in every way by reason of voire dire and the Judge's charge to the Jury its own inner safeguards that such prejudice be removed. I feel very strongly in this instance that I am being denied rights as a citizen of the United States. . . . We are being told, in fact, that the citizens of New York State are incapable of divorcing the vocation of the attorney from the guilt or innocence of the defendant. I find that this kind of judgment leaves much to be desired, underestimates the

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> intelligence of the juror upon which our very jury system depends, and denies me and the defendant rights which are essentially constitutional."

Since Judge Lane barred Father La Rocca from serving as counsel, Father La Rocca instituted a proceeding to prevent the enforcement of Judge Lane's ruling. In his affidavit in support of his petition to the Criminal Term, to establish his right to wear clerical attire, Father La Rocca stated that:

> ". . . the wearing of the clerical collar at all public functions is a continual act of worship and a symbol of religious dedication. Removal of the clerical collar for an appearance before a jury would offend my religious conscience." (See Appendix D, p. D-2).

The Supreme Court, Kings County, prohibited Judge Lane from requiring Father La Rocca to remove his clerical collar. The Appellate Division reversed and dismissed Father La Rocca's petition, with Justice Shapiro dissenting, deciding that Father La Rocca's "rights under the First Amendment must yield to the reasonable regulation of the Court when he appears to try a case before a jury". This decision of reversal was affirmed by the New York Court of Appeals, the majority concluding that "the paramount judicial duty to assure a fair trial" required such affirmance. Associate Judge Gabrielli dissented for the reasons set forth in the dissenting opinion by Justice Shapiro at the Appellate Division.

Reasons for Granting the Writ

The mode of dress of a Roman Catholic cleric is prescribed by Canon Law which, in effect, states that the dress of a priest shall be determined by local custom and by the prescription of his superiors. I Abbo-Hannan, THE SACRED CANONS, 194-96 (2d ed. 1960). The Third Baltimore Council, a Church body which interpreted Canon Law in the United States, has ruled that local custom means the priest must wear his Roman collar while functioning in the public forum. *Ibid.* In denying Father La Rocca the right to appear in his clerical garb before a jury as defense counsel in a criminal trial, the New York Court of Appeals has decided an important question of federal constitutional law in a way not in accord with the applicable decisions of this Court. Those decisions indicate that such a denial is a violation of the establishment, free exercise and free expression mandates of the First Amendment, the fair trial, due process and assistance of counsel mandates of the Fifth and Sixth Amendments and the due process mandate of the Fourteenth Amendment to the United States Constitution.

If this decision is allowed to stand, not only will constitutionally protected rights of Father La Rocca have been disregarded, but also the rights of many clergy of various faiths will have been severely limited. Furthermore, carried to its logical conclusion, the decision rendered by the New York Court of Appeals would require that any clerical or non-clerical symbol, practice, expression or inference which might find its way into the trial process, could, based on determination of the trial judge alone, be grounds for removal of defense counsel.

Argument

1. FREE EXERCISE: In its determination that Father La Rocca should not be permitted to wear his Roman collar, the Court of Appeals disregarded the clear mandates of this Court by permitting a major infringement on Father La Rocca's free exercise rights, absent the presence of a compelling interest warranting such an infringement. The preferred position of these rights was ignored; the Court instead reached its decision by balancing Father La Rocca's constitutionally protected free exercise rights against the judicial duty to assure a fair trial for the state in a criminal prosecution. No consideration was given to, nor support cited for, the status of this judicial duty either as a compelling interest or otherwise. Whatever the nature of that duty, no constitutional definition was or could be given thereto. Nevertheless, the Court of Appeals held that duty to be more compelling than the First Amendment rights involved.* Going further, the Court of Appeals failed to consider the available alternative means which would have allowed protection of the impartiality of the trial while also preserving Father La Rocca's constitutionally protected rights.

In *Sherbert* v. *Verner*, 374 U.S. 398 (1963), this Court required, prior to permitting any infringement on the preferred First Amendment free exercise rights of an individ-

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* The Court of Appeals conceded that Father La Rocca had alledged an interest under the free exercise clause (see Appendix A, p. A-8) and also noted that Father La Rocca's claim that his wearing of the collar in the public forum was a result of the designation of his religious superiors was uncontroverted. (See Appendix A, p. A-11.)

ual, that a compelling state interest be shown to exist,* and that, in addition, no alternative form of regulation exists which would eliminate the abuse without such infringement. *See also, Wisconsin* v. *Yoder,* 406 U.S. 205 (1972).

Since this Court has set forth time and again the considerations which must be examined and satisfied prior to permitting infringement of First Amendment free exercise rights, and since the Court of Appeals disregarded those standards, the Court of Appeals based its determination on conjecture as to the possibility of prejudice rather than on any actual evidence of prejudice. Indeed, Father La Rocca was not disqualified after an unsuccessful *voir dire,* but was removed without any questions being put to any prospective juror. Since there exists no compelling state interest, and since there are a multitude of alternative means to combat

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* In his dissenting opinion in the Appellate Division, Justice Shapiro stated:

> "Hence, when the majority seeks to apply the compelling-state-interest test by a process of balancing the competing values of the State's right to a fair trial against the petitioner's right to a free exercise of religion, without a prior determination of whether the preservation of the former in the circumstances of this case requires that the First Amendment right of the petitioner be infringed, it is, in fact, giving mere lip service to the applicable compelling-state-interest test established to make clear the preferred position of that First Amendment right and is applying a completely different test, in negation of the concededly applicable Federal standard." (See App. B, p. B-17.)

In contrast, Chief Judge Breitel, writing the majority opinion of the Court of Appeals disregarded the compelling state interest test and applied a balancing test, stating:

> "The Supreme Court cases construing the Freedom of Exercise Clause are not particularly helpful. * * * In the instant case, however, the particular limited religious practice has been found to conflict with the State's paramount duty to insure a fair and impartial trial. The respective interests must be balanced to determine whether the incidental burdening is justified." (App. A, p. A-10.)

any potential abuse,* Father La Rocca's First Amendment free exercise rights have been unconstitutionally infringed.

2. ESTABLISHMENT: This Court set forth the guidelines that must be examined and satisfied whenever the question of establishment of religion arises when it warned that the Constitution ". . . requires the State to be *neutral* in its relations with groups of religious believers and non-believers; it does not require the State to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." *Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947) (emphasis added). Almost 25 years thereafter, this Court once again reiterated those guidelines and condemned any attempts to vary from that neutrality. *Gillette* v. *United States*, 401 U.S. 437 (1971). Mr. Justice Marshall, speaking for the majority, stated in *Gillette* that ". . . the Establishment Clause stands at least for the proposition that when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact." 401 U.S. at 450.

The Court of Appeals failed to consider this neutrality proclamation and, consequently, in its refusal to allow Father La Rocca to practice law before a jury in the required attire of his office, the clergy of all religions, save those requiring distinctive dress, are preferred while those subject to religious dress codes are handicapped. This results in a direct violation of the establishment clause as interpreted by this Court.

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* For example: (1) *voir dire;* (2) the mandatory preliminary instructions of the court [N.Y.C.P.L. §370.40 (McKinney, 1971)]; (3) the court's charge to the jury [N.Y.C.P.L. §300.10 (McKinney, 1971)]; (4) the court's right to give miscellaneous instructions to the jury [*People* v. *Colon*, 28 N.Y.2d 1, *cert. denied*, 402 U.S. 905 (1971)]; (5) the court's inherent right to regulate closing argument.

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3. EXPRESSION: Even without the religious overtones of Father La Rocca's situation, First Amendment values are still before this Court for vindication since attire has been held to be a silent and passive expression of opinion, akin to pure speech, and, consequently, covered by the comprehensive protection of the First Amendment. *Tinker* v. *Des Moines,* 393 U.S. 503 (1969). The facts before this Court bear a definite analogy to those underlying the facts in *Tinker,* wherein black armbands (but not iron crosses or political buttons) were restricted. Only the garb of a Roman Catholic priest, and not any other political, fraternal or religious insignia, is restricted by the decision below. The prohibition against the expression of one particular opinion, in the absence of a constitutionally valid reason to regulate such opinion, cannot be tolerated. Furthermore, as in the case of free exercise requirements, the presence of a substantial governmental purpose itself is not enough:

> "Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in light of *less drastic means* for achieving the same basic purpose." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960) (footnotes omitted) (emphasis added).

The peremptory treatment by the Court of Appeals of Father La Rocca's free expression rights highlights that Court's refusal to recognize the requirements of this Court in the area of First Amendment freedoms.

4. ASSISTANCE OF COUNSEL, FAIR TRIAL AND DUE PROCESS: The unconstitutionality of the action taken below is underscored by its effect on Cecelia Daniels' right to assistance of counsel and the concomitant rights to a fair

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trial and due process of law. While its result is not the outright denial to Ms. Daniels of the assistance of counsel at trial, the decision below has forced the removal of the counsel in whom Ms. Daniels has placed her confidence and trust as the result of the attorney-client relationship that was preexistent. Moreover, the decision now confronts Ms. Daniels with the decision of foregoing her right to a jury trial or proceeding without Father LaRocca. Such a forced choice between constitutional guarantees is impermissible for the same reason that it was impermissible to abrogate Father La Rocca's constitutional rights. This record is devoid of any showing by the state that such a result is mandated by a compelling state interest.

Conclusion

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the New York Court of Appeals.

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APPENDICES

Appendix A

Opinion of the New York Court of Appeals

Chief Judge BREITEL. This is a proceeding brought to prohibit respondent, a Judge in the Criminal Court, from requiring petitioner, a Roman Catholic priest, to change his clerical garb before appearing as defense counsel in a criminal jury trial. Special Term granted the petition and prohibited the Presiding Judge from enforcing his order. The Appellate Division reversed, one Justice dissenting, and dismissed the proceeding on the merits. Petitioner appeals.

The preliminary question is whether prohibition under CPLR article 78 lies. If it does, the issue becomes whether the court's direction violated petitioner's right to free exercise of religion.

There should be an affirmance.

Prohibition is available to restrain an inferior court or Judge from exceeding its or his powers in a proceeding over which the court has jurisdiction. While a court has authority to regulate the conduct and appearance of counsel in proceedings before it, that authority is not unlimited. In exercising the power to regulate conduct and appearance, a court may not violate the constitutional right of counsel to free exercise of religion. Petitioner has presented a substantial claim that the Judge in the Criminal Court has exceeded his powers. Thus, petitioner should be able, in the first instance, to seek redress by prohibition.

The free exercise of religion is a highly protected interest but is not absolute. The incidental burden on petitioner's freedom to exercise his religion must be balanced against the State's paramount duty to insure a fair trial in

a criminal action for both defendant and the People. In striking the balance it is concluded that the performance of the State's paramount duty to insure a fair trial may not be substantially jeopardized because of petitioner's right, however significant, to free exercise of his religion.

• • •

Petitioner has been an ordained Roman Catholic priest for 25 years. Admitted to the Bar in 1973, petitioner is a lawyer employed for his second year by the Legal Aid Society. He was assigned by the society to represent an indigent defendant in a criminal jury trial in the case of the People against Cecelia Daniels in the Criminal Court of the City of New York. Defendant Daniels was charged with assault on her child's school teacher and is free on parole.

On January 7, 1974, when petitioner appeared for trial, the trial prosecutor objected to proceeding while petitioner was dressed in clerical garb. The objection was based upon a concern that petitioner's clerical costume might influence even one juror, and perhaps prejudice a juror for or against the defendant. Petitioner protested; he stated that he had always worn clerical garb at law school, at his appearances before the Committee on Character and Fitness, at his admission to the Bar, and at all previous court appearances. He acknowledged, however, that he had never before represented a client at a jury trial. Petitioner also stated that he had been "designated" by his bishop to appear in court as a Catholic priest wearing his clerical garb. In opposing the trial assistant's objection, petitioner argued that a directed removal of his clerical garb by the court would vio-

late his client's right to be represented by counsel of her own choice, and would also violate his right to free exercise of religion.

After considerable colloquy, the court directed that, unless petitioner were to remove his clerical collar, he would not be permitted to continue as defense counsel. The court's directive was grounded in its expressed concern that members of the jury might be prejudiced by the appearance of petitioner in his clerical costume, and therefore a fair trial could not be assured. Petitioner refused to remove his clerical collar and instituted the present proceeding. The trial in the criminal action, although not stayed, has never taken place. In his petition, petitioner contended only that the judicial direction to remove his clerical collar denied him his constitutional right to free exercise of religion.

* * *

The "ancient and just" writ of prohibition is rooted deep in the common law. Originally used by the English king to curb the powers of ecclesiastical courts, prohibition has evolved into a basic protection for the individual in his relations with the State (see *Appo v People*, 20 NY 531, 541-542; Wolfram, The "Ancient and Just" Writ of Prohibition in New York, 52 Col L Rev 334, 338-353; Third Annual Report of N. Y. Judicial Council, 1937, p 137 *et seq.*; see, also, 23 Carmody-Wait, 2d New York Practice §145:216, p 792).

It is well settled, and has been restated many times, that prohibition is available both to restrain an unwarranted assumption of jurisdiction and to prevent a court from exceeding its authorized powers in a proceeding over

which it has jurisdiction (see, e.g., CPLR 7803, subd 2; *Matter of Nigrone v Murtagh,* 36 NY2d 421, 423-424; *Matter of State of New York v King,* 36 NY2d 59, 62; *Matter of Roberts v County Ct. of Wyoming County,* 34 NY2d 246, 248; *Matter of Proskin v County Ct. of Albany County,* 30 NY2d 15, 18; *Matter of Lee v County Ct. of Erie County,* 27 NY2d 432, 436-437; *Matter of Hogan v Culkin,* 18 NY2d 330, 336; *Appo v People,* 20 NY 531, 541, *supra*). The extraordinary remedy of prohibition is never available merely to correct or prevent trial errors of substantive law or procedure, however grievous (see, e.g., *Matter of State of New York v King, supra,* at p 62; see generally, 23 Carmody-Wait, 2d, New York Practice, *op. cit.,* §145:232, p 831 *et seq.*). The orderly administration of justice requires that correction of litigation errors merely be left to the ordinary channels of appeal or review. Otherwise one would erect an additional avenue of judicial scrutiny in a collateral proceeding and thus frustrate the statutory or even constitutional limits on review (see, e.g., *Matter of State of New York v King, supra,* at pp 63-64).

If, however, a court acts without jurisdiction, or acts or threatens to act in excess of its powers, other principles are applicable. Prohibition is not mandatory, but may issue in the sound discretion of the court (see, e.g., *Matter of Hogan v Court of Gen. Sessions of County of N.Y.,* 296 NY 1, 8; *Matter of Culver Contr. Corp. v Humphrey,* 268 NY 26, 39). In exercising this discretion, a number of factors should be considered.

The gravity of the harm which would be caused by an excess of power is an important factor to be weighed (see

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Matter of Culver Contr. Corp. v Humphrey, 268 NY 26, 40, *supra;* see, also, 23 Carmody-Wait, 2d New York Practice, *op. cit.,* §145:216, pp 793-794). Also important, but not controlling, is whether the excess of power can be adequately corrected on appeal or by other ordinary proceedings at law or in equity (see, e.g., *Matter of State of New York v King,* 36 NY2d 59, 62, *supra; Matter of Roberts v County Ct. of Wyoming County,* 34 NY2d 246, 249, *supra*).

If an adequate remedy is available, the burdening of judicial process with collateral proceedings, interruptive of the orderly administration of justice, would be unjustified. If, however, appeal or other proceedings would be inadequate to prevent the harm, and prohibition would furnish a more complete and efficacious remedy, it may be used even though other methods of redress are technically available (see, e.g., *Matter of Lee v County Ct. of Erie County,* 27 NY2d 432, 437, *supra; Matter of Culver Contr. Corp. v Humphrey,* 268 NY2d 26, 40, *supra*). For example, to force a person, faced with a court acting or threatening to act without jurisdiction, or in excess of its powers, to proceed in contempt, and to remain confined until "ultimate justice" is obtained upon appeal in habeas corpus proceedings, would be to undermine the very reason for the remedy (see *People ex rel. Livingston v Wyatt,* 186 NY 383, 396 [E. T. Bartlett, J., dissenting], contra, p 394; see, generally, Wolfram, 52 Col L Rev 334, *op. cit.,* pp 342-344).

On this analysis, it is crucial to distinguish between an error in procedure or substantive law during a litigation and the arrogation of power which is subject to correction

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by prohibition. Thus, even constitutional issues involving errors of substantive or procedural law are not cognizable by way of prohibition (see, e.g., *Matter of Blake v Hogan*, 25 NY2d 747, 748; *Matter of Watts v Supreme Ct. of Tioga County*, 36 AD2d 17, 18, mot for lv to app den 28 NY2d 714). If, however, a court acts without jurisdiction, or acts or threatens to act in excess of its powers, and it affirmatively appears that this will be done in violation of a person's, even a party's, rights, but especially constitutional rights, prohibition will lie to restrain the excess of power (see *Matter of Lee v County Ct. of Erie County*, 27 NY2d 432, 437-438, *supra; Matter of Kraemer v County Ct. of Suffolk County*, 6 NY2d 363, 365; *Matter of Abraham v Justices of Supreme Ct. of N. Y. County*, 37 NY2d 560; *Matter of Scott v McCaffrey*, 12 Misc 2d 671, 674).

True, there is no sharp line between a court acting in error under substantive or procedural law and a court acting in excess of its powers, if only because every act without jurisdiction or in excess of its powers in a proceeding over which it has jurisdiction of necessity involves an "error of law". But the absence of bright lines of demarcation in the law is not unusual; man's language and capacity to conceptualize is not perfect. The fact is that in extreme enough cases the distinction is easily apparent. At one extreme, a trivial error in excess of jurisdiction may be just that, trivial, and hardly worthy of treatment as an excess of power. On the other hand, at the other extreme, a gross abuse of power on its face and in effect may be in reality so serious an excess of power incontrovertibly justifying and requiring summary correction. A good example of the last was the gross, unprecedented, and even suspect

as to motivation, direction to disclose an entire transcript of a Grand Jury investigation in a case involving limited issues (see *Matter of Proskin v County Ct. of Albany County*, 30 NY2d 15, 18-19, *supra*). The law generally and the extraordinary remedy of prohibition has not developed as a linguistic exercise but as a response in language and concept to the recognized needs and accommodations in a society governed by the rule of law. There is a larger logic than that delineated by etymology. To eliminate or minimize the concept of an excess of power, on presumed verbalistic grounds, would undermine a common-law principle of ancient standing and the continuous statutory statement of that principle (see *Appo v People*, 20 NY 531, 541, *supra;* CPLR 7803, subd 2; Civ Prac Act, §1296, subd 2)

Petitioner does not, as he could not, dispute the power of the court to regulate generally counsel's conduct and appearance (see *Matter of Peck v Stone*, 32 AD2d 506, 508; *People* v. *Rainey*, 224 Cal App 2d 93, 95-98; cf. *People ex rel. Karlin v Culkin*, 248 NY 465, 473). Instead, petitioner argues that the trial court exceeded its powers in directing removal of his clerical garb, a direction allegedly violative of petitioner's right to free exercise of religion. He offers a "substantial" argument in support of his contentions. True, upon reaching the merits, the court may decide the issue adversely to petitioner. But this would not foreclose the remedy. When a petitioner, whether party or not, but especially where one is not a party, presents an arguable, substantial, and novel claim that a court has exceeded its powers because of a collision of unquestioned constitutional

principles, he may, in the first instance, seek redress by prohibition.

Thus, petitioner seeks to vindicate his right to free exercise of religion, certainly a preferred right included among the great human rights in a free and open society (see *Matter of Brown v McGinnis*, 10 NY2d 531, 536; US Const, 1st Amdt; NY Const, art I,§ 3). With respect to such a preferred right, and its safeguarding, prohibition is a "more complete and efficacious remedy" to redress the alleged excess of power, if that it were. Petitioner should not be compelled to test the alleged excess of power in such a significant area of constitutional right by proceeding in contempt of court and habeas corpus proceedings. Nor is appeal in the criminal action an adequate remedy since his client, the defendant, might be acquitted or a conviction reversed on another ground, or she might refuse to take an appeal. Moreover, on a conviction there would be an additional obstacle to establish, namely, that the "error" was material, a condition difficult to surmount in the particular criminal action since as an indigent with assigned counsel she had a right to counsel but lacked the right to stipulate who that counsel should be (see *People v Brabson*, 9 NY2d 173, 180-181). Thus, prohibition should be available in the discretion of the court to test whether petitioner is entitled to restraint of an inferior court from directing removal of petitioner's clerical garb.

Having determined that the remedy of prohibition is appropriate, the merits of the application may be addressed. The appearance of a lawyer in court is the occasion for him to discharge a particular function in the

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administration of justice. His function is not to displace his client but to serve as his agent in the litigation. It is rarely good advocacy and never quite ethical for the lawyer to substitute himself for the client before jury or court. That this may happen because of the limitations of human nature does not undermine the imperative of the rule. To the extent to which it is possible, the improper displacement of client by attorney should be minimized by elimination of egregious assumed or real idiosyncrasies of dress, appearance, status, or conduct. The purpose is, at least as to outward appearances, to place counsel in their proper relation toward their clients.

"A Judge must have and does possess the power to enforce order and control behavior in the courtroom; and, as an officer of the court, an attorney is subject to the control and direction of the Judge" (*Matter of Peck v Stone,* 32 AD2d 506, 508, *supra;* see *People ex rel. Karlin v Culkin,* 248 NY 465, 470-471, *supra;* Code of Judicial Conduct, Canon 3, subd A, par [2]). Thus, the lawyer is subject to the regulation of the Judge in matters of attire when that regulation is reasonably related to the preservation of order and decorum in the courtroom, the protection of the rights of parties and witnesses, and generally to the furtherance of the administration of justice (see *People v Rainey,* 224 Cal App 2d 93, 95-98, *supra;* cf. *People v Jelke,* 308 NY 56, 63).

Primary, of course, in a criminal action, is the right of both the defendant and the People to a fair and impartial trial. Indeed, a fair trial is a paramount constitutional condition in any judicial proceeding; it is the foundation of a criminal trial, if justice be its essence.

Freedom of exercise of religion is not an absolute, albeit a preferred right (*Matter of Brown v McGinnis,* 10

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NY2d 531, 536, *supra;* see NY Const, art I, §3). While freedom to believe is absolute, freedom to act is not. Religious practices are subject to regulation for the protection of society (see *Matter of Brown v McGinnis, supra,* at p 536).

The Supreme Court cases construing the freedom of exercise clause are not particularly helpful. In *Sherbert v Verner* (374 US 398, 403) the court stated that an incidental burden on the right to free exercise of religion may be justified by a " 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate' " (citing *NAACP v Button,* 371 US 415, 438). In some of the cases, religious practices posed a substantial threat to public safety, peace or order (see, e.g., *Cleveland v United States,* 329 US 14, 19; *Prince v Massachusetts,* 321 US 158, 166-167; cf. *People v Sandstrom,* 279 NY 523, 530). In others, religious practices conflicted with interests deemed not of paramount importance to the State (see, e.g., *Wisconsin v Yoder,* 406 US 205, 228-229; *Sherbert v Verner,* 374 US 395, 406-407, *supra*). In the instant case, however, the particular limited religious practice has been found to conflict with the State's paramount duty to insure a fair and impartial trial. The respective interests must be balanced to determine whether the incidental burdening is justified (see *People v Woodruff,* 26 AD2d 236, 238, affd 21 NY2d 848).

A clergyman is accorded high status by most members of our society. Whatever the character of the man or woman who wears the cloth, the cleric is accorded a measure of respect and trust unlike that which is given to those of other vocations. Consequently, it is understandable, but

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not condonable, that a juror might view differently statements made by a member of the clergy than those made by others, and might ascribe a greater measure of veracity and personal commitment to the rightness of his client's cause.

On the other side of the issue it is most unfortunate, but yet undeniable, that there exist religious prejudices. These prejudices, often insidious and usually denied, might spill over from a laweyr-cleric of whatever faith to the client. Although petitioner's client said she wished him to remain as her attorney despite this possibility, it is not the defendant in a criminal action but the court which must insure a fair trial. So fundamental is the guaranty of a fair trial that even in the absence of objection or exception by defendant or counsel an unfair trial must result in a reversal of a conviction (see *People v McLucas,* 15 NY2d 167, 172; *People v Bradner,* 107 NY 1, 4-5).

The trial court in directing change of petitioner's garb if he persisted in trying the case before a jury, acted to preserve the right of both the defendant and the People to a fair trial. In so doing, the court of necessity limited defense counsel's right to free exercise of religion in that he was compelled to remove the symbol of his religious calling, a requirement of his calling which is not unconditional or beyond dispensation. The risk that a fair trial could not be had outweighed this incidental limitation.

The problem presented by the case is not facilitated in any direction by petitioner's recital that he was "designated" by his bishop to wear his clerical garb as a lawyer. While this designation or direction is uncontroverted, the record does not establish in any degree why this designation

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or direction was made, or whether it was absolute or conditional. Nor does petitioner now make much of the point, assuming that he still relies on it, which one should assume. But assuming that that is so may not change the result in the case, once it is determined reasonably that the paramount judicial duty to assure a fair trial is involved.

Nor does this appeal raise the problem of nonclerical religious practices, symbols, and expressions which might be presented, or which might invoke absolutes of religious doctrine, in the tableau of a judicial trial. Although even then egregious circumstances might be presented which arguably and reasonably could impair the provision for a fair trial. But no such question is now involved, such as the propriety of head coverings, nonclerical religious garb, common religious symbols worn by devotees of a faith, or abstentions from oath taking or other incidents of a judicial trial not involving the displacement of a client, whether it be the People or the defendant in a criminal jury trial, by a member of the clergy of whatever faith who also doubles as a lawyer.

Accordingly, the order of the Appellate Division should be affirmed, without costs.

GABRIELLI, J. (dissenting). I vote to reverse, on the well-reasoned dissenting opinion by Mr. Justice J. IRWIN SHAPIRO at the Appellate Division.

Judges JASEN, JONES, WACHTLER, FUCHSBERG and COOKE concur with Chief Judge BREITEL; Judge GABRIELLI dissents and votes to reverse in a memorandum.

Order affirmed.

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Appendix B

Opinion of the Appellate Division, Second Department

APPEAL from a judgment of the Supreme Court (GUY J. MANGANO, J.), entered April 9, 1974 in Kings County, in a proceeding pursuant to CPLR article 78, which granted the petition to prohibit the appellant from requiring the petitioner to remove his clerical collar while acting as defense counsel in a certain criminal case.

Louis J. Lefkowitz, Attorney-General (*Robert S. Hammer* and *Samuel A. Hirshowitz* of counsel), for appellant.

William Gallagher and *Mario Matthew Cuomo* (*Eric A. Seiff, Pierce Gerety, Jr.*, and *John E. H. Stackhouse* of counsel), for respondent.

Aaron Nussbaum for Kings County Criminal Bar Association, Inc., *amicus curiae.*

Ernest J. Bertolotti (*Michael T. Sullivan, John E. Pearson, Michael S. O'Rourke, Scott E. Mollen* and *Martin J. Kilkeary* of counsel), for Ad Hoc Committee for the Defense of Clerical Rights, *amicus curiae.*

HOPKINS, Acting P.J. The petitioner has been an ordained Roman Catholic priest for 25 years. He was admitted to the Bar in 1973. He is employed as an attorney by the Legal Aid Society and was assigned to represent Cecelia Daniels, a defendant under criminal charges in the Criminal Court of the City of New York. He appeared before the court wearing his clerical collar, prepared to try the case before a jury on behalf of his client. The Assistant District Attorney objected to the appearance by the petitioner in the garb of a Roman Catholic priest. After considerable colloquy, during which the petitioner

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maintained both the right of the defendant to be represented by him in his clerical habit and his right to so appear, the trial court directed him to remove his clerical collar before proceeding further in the trial.

The court then adjourned the case in order that its ruling might be reviewed. The petitioner thereafter brought this CPLR article 78 proceeeding in the nature of prohibition to restrain the Criminal Court from preventing him from trying the case before the jury wearing a clerical collar. The Criminal Term of the Supreme Court[1] has granted the petitioner's application and has prohibited the Criminal Court from enforcing its order (*La Rocca v Lane*, 77 Misc 2d 123) We reverse and dismiss the proceeding. The Criminal Court did not act improvidently in directing the petitioner not to appear in a clerical collar and no constitutional rights of the petitioner or his client were violated by the direction.

The Criminal Court, in making its direction, was motivated by its concern that the members of the jury might be prejudiced by the appearance of the petitioner in his clerical garb and that, accordingly, a fair trial could not be conducted. The Criminal Term, on the other hand, found that no bias might be presumed, that by the *voir dire* the presence of bias might be detected and eradicated and that the defendant in the criminal case is entitled to the assistance of counsel of her own choice. These conflicting views, together with the constitutional right under the First Amendment raised by the petitioner, compel us to weigh issues of great importance within our system of justice.

1. This proceeding was determined at Criminal Term, although proceedings pursuant to CPLR (art. 78) are returnable at Special Term.

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Opinion of the Appellate Division, Second Department

The issues, as we see them, are threefold: (1) the right of the defendant in a criminal case to be represented by counsel attired in priestly garb, (2) the right of the petitioner under the First Amendment to appear in court as an attorney so attired before a jury, and (3) the power of the court to regulate the dress of an attorney.

I. THE RIGHT OF THE DEFENDANT

We first note that the defendant in the criminal case is represented by the Legal Aid Society, not by the petitioner. The petitioner, as an attorney employed by the Legal Aid Society, was assigned by it to represent the defendant. The defendant, as an indigent, was entitled to the assistance of counsel (*Gideon v Wainwright,* 372 US 335), even though the crime charged was a misdemeanor (County Law, §722-a). The right to counsel is not absolute (*People v Brabson,* 9 NY2d 173, 180); thus, the defendant could not force the court to assign particular counsel, even within the Legal Aid Society's office (*People v Howard,* 150 Cal App 2d 428; *People v Cox,* 22 Ill 2d 534, cert den 374 US 855; cf. *State v Rush,* 46 NJ 399; *People v Norman,* 252 Cal App 2d 381, cert den 391 US 923; *Commonwealth v Johnson,* 428 Pa 210; *Baker v People,* 299 F Supp 1265). The court's duty is simply to select competent counsel within the provisions of the statute (County Law, §722; see 21 Am Jur 2d, Criminal Law, §319).

The defendant's constitutional right to assistance of counsel is satisfied when he is represented by competent counsel. His right does not extend to representation by the petitioner, whether in clerical garb or not. In the event,

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then, that the petitioner was compelled for reasons grounded on religious belief or for other reasons to request to be relieved of his assignment, the defendant could not on account of her preference for the petitioner require the court to continue his representation. Indeed, in the context of this case, the Legal Aid Society would simply assign another attorney on its staff to the defendant.

There is, in brief, no infringement of the defendant's right to counsel by the action of the Criminal Court.

II. THE PETITIONER'S RIGHTS UNDER THE FIRST AMENDMENT

The free exercise of religious beliefs has been surrounded by special protection under the First Amendment. Though it is in many ways a kind of personal expression, the intrusion into which by State action is forbidden, the right of individual worship is not altogether beyond regulation by the State. The freedom to practice one's religion does not, for instance, deprive the State from compelling the individual's testimony before the grand jury (*People v Woodruff*, 26 AD2d 236, affd 21 NY2d 848). The State Constitution, indeed, states that "the liberty of conscience hereby secured shall not be so construed as to * * * justify practices inconsistent with the peace or safety of this state" (NY Const art I, §3).

Of course, the First Amendment takes precedence over our State Constitution (*Cantwell v Connecticut*, 310 US 296). Hence, it is the Federal standard to which we must look in determining whether the petitioner's right of religious freedom has been violated by the order of the Crim-

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inal Court. The Federal standard requires us to find that any incidental burden on the petitioner's exercise of his religion must be justified by a compelling State interest in the regulation of a subject within the State's power to regulate (*Sherbert v Verner*, 374 US 398, 403; *Wisconsin v Yoder*, 406 US 205, 220). A balancing of the particular values becomes, therefore, the mechanism whereby the constitutionality of the regulation is decided. In striking the balance, it has been suggested by a leading commentator that three elements are involved—first, the importance of the secular value underlying the regulation; second, the degree of necessity that the regulation bears to that value; and third, the impact that an exemption for religious reasons would have on the program carrying out the regulation (Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development, Part 1., The Religious Liberty Guarantee, 80 Harv L Rev 1381, 1390). To this should be added the admonition spoken in the Supreme Court decision upholding laws abolishing polygamy that, although laws "cannot interfere with mere religious belief and opinions, they may with practices" (*Reynolds v United States*, 98 US 145, 166).

It should be noted that the petitioner claims that he is under instructions from his Bishop to wear his collar and that he fulfills his right of religious worship by doing so in the performance of his duties as an attorney. On the other hand, it is beyond question that the petitioner's dress is regulated by the court only when he is performing his duties as an attorney in a trial before a jury. The court did not undertake to prohibit him from wearing the clerical

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collar as a spectator, as a witness, or as a party. Undoubtedly, the relationship between the court and an attorney is more intimate and more subject to regulation than is the status of a spectator, witness, or party, although certainly there is residual power in the court even to regulate that status (American Bar Association Project on Minimum Standards for Criminal Justice, The Function of the Trial Judge, §§1.1, 5.3, 6.3, 6.8, 6.10 [Tentative Draft]).

We turn, then, to a consideration of the secular value involved. There is hardly a stronger interest within the governmental structure than the preservation of the right to a fair trial, both by the accused and by the prosecution. The Trial Judge's function largely rests in his duty to insure that this right is enforced and maintained. Even with respect to the constitutional right of the free press, the right of the Trial Judge to control the proceedings within his courtroom may be pre-eminent (A.B.A. Project on Minimum Standards for Criminal Justice, Fair Trial and Free Press, §3.5, subd. [a] [Tentative Draft]; cf. *Sheppard v Maxwell,* 384 US 333; *People v Jelke,* 308 NY 56).

Concerning the degree of necessity which the regulation bears toward the value, it is manifest that a fair trial is linked closely to the conduct of the attorneys appearing in the trial. An attorney is subject to the reasonable orders of the court to preserve a fair trial (*Sacher v United States,* 343 US 1; A.B.A. Project on Minimum Standards for Criminal Justice, The Function of the Trial Judge, §6.5 [Tentative Draft], The Prosecution Function, §5.2 [Approved Draft] The Defense Function, §7.1 [Approved Draft]). Of course, the emphasis must be placed on the

reasonableness of the orders; an attorney should not be fettered by directions which are arbitrary and bear no relation to the objective of a fair trial. We think that this requirement is answered by the rules which govern the power of the court generally to maintain decorum and fairness in a trial, to which we advert beyond.

Last, we consider what effect on a fair trial an exemption from the regulation would have in the program carrying out the regulation. There are few clergymen who practice law generally. An exemption for the petitioner would affect only the trials in which he appears. Nevertheless, he is a staff member of the Legal Aid Society, which is regularly engaged in the defense of persons charged with criminal offenses. Moreover, the regulation has a minimal effect on the petitioner's conduct, for it is directed against him only when he tries cases before a jury[2] and requires him only to doff his clerical collar. If, indeed, the court's order is reasonably aimed at attaining the value of a fair trial, an exemption, even for one attorney, would be unwarranted, since it would single out the petitioner for special favor.

On balance, then, we conclude that the petitioner's right to free exercise of religious belief is subject to reasonable regulation when he appears as an attorney in court to try a case before a jury. Other considerations support this view. The petitioner's right to practice as an attorney is quite different from his right to officiate as a clergyman.

2. The petitioner contends that this establishes the lack of reason for the regulation, since he may appear in nonjury cases or on other occasions in court in his clerical attire. But this claim ignores the difference between a jury trial and other court proceedings. It is arguable that even in a nonjury case the petitioner should not wear clerical garb (see discussion under "III" *infra*), so that he is favored by the regulation to this extent.

When he appears in court, he is not acting as a priest. This does not mean that he gives up his religious beliefs or his priestly duties when he acts as an attorney; it does mean, however, that when he enters on secular pursuits he is subject to reasonable regulations in the secular realm. Any exemption at all in behalf of the petitioner would tend to destroy a pattern of conduct common to all attorneys (cf. *Braunfeld v Brown,* 366 US 599; *United States v Hudson,* 431 F2d 468, cert den *sub nom. Hudson v United States,* 400 US 1011).

In addition, there exists stronger grounds for regulating action based on religious convictions than for regulating mere inaction, as the Supreme Court observed in the *Reynolds* case (*Reynolds v United States,* 98 US 145, 161, *supra*). In *Sherbert,* for example, the regulation which prevented the plaintiff from enjoying the benefit of unemployment compensation because of her refusal to work on Saturday (inaction) for religious principles was struck down (*Sherbert v Verner,* 374 US 398, *supra*), and in *Wisconsin v Yoder* (406 US 205, *supra*) it was the defendant's refusal to send his children to school beyond the eighth grade which was attacked. Here, however, the petitioner is seeking to engage in the active practice of the law, and his refusal to adhere to the direction of the court falls within that affirmative endeavor.

In summary, we are of the opinion that the petitioner's rights under the First Amendment must yield to the reasonable regulation of the court when he appears to try a case before a jury. The question still remains, however, whether the court's order was reasonable under the circumstances. To this question we now address ourselves.

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III. THE POWER OF THE COURT TO REGULATE THE ATTIRE OF AN ATTORNEY

The power of a court over proceedings in the courtroom cannot be better expressed than by the language of Judge (then Justice) GABRIELLI in *Matter of Peck v Stone* (32 AD2d 506, 508): "A Judge must have and does possess the power to enforce order and control behavior in the courtroom; and, as an officer of the court, an attorney is subject to the control and direction of the Judge (*People ex rel. Karlin v Culkin*, 248 NY 465). The Judge is properly given broad discretionary powers in the regulation of his courtroom; and so it should be. Furthermore, membership in the Bar is a privilege burdened with conditions and while certain conditions of conduct may be imposed by a Judge, the imposition of any such rule must bear a reasonable relationship to contemporary conditions and ought to be imposed only after there is a reasonable foundation for the need of any rule.

"In becoming an officer of the court, an attorney becomes an instrument or agency to advance the ends of justice. Thus it is required that there be co-operation with the court whenever justice would be adversely affected if co-operation were withheld. While such is the responsibility of an attorney and while it is the duty of a Judge to preserve order and to insure that justice is not obstructed, it nonetheless follows that any order or regulation imposed upon attorneys practicing before him must be based upon factual conditions which leave no doubt that a continuance of the proscribed conduct will result in a disrespect for order and an impairment in the administration of justice. To this

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end, therefore, any such order or rule must have a reasonable or plausible basis, else this discretionary power is subject to being declared arbitrarily exercised."

It is difficult to mark a definite line which will conclusively fence off the discretionary power of a court to enforce procedures to insure the integrity of the judicial process. Each case turns on its own facts, but the main purpose of the procedure must always be kept in mind—the preservation of the judicial process. A judge must observe the duties impressed upon him by the Code of Judicial Conduct—one of whose canons dictates that he shall "maintain order and decorum in proceedings before him" (Code of Judicial Conduct, canon 3, subd A, par [2]) and another of which prescribes that he shall "diligently discharge his administrative responsibilities" (Code of Judicial Conduct, canon 3, subd B, par [1]). But there underlies all of these prescriptions the fundamental principle that the court shall conduct the business before it fairly toward all.

The Criminal Court clearly had in mind, in issuing its order, its desire to conduct a fair trial, stating that the petitioner's attire "would create a prejudice which would prevent [it] from conducting a fair and impartial trial before a jury." The petitioner argues with considerable force that the *voir dire* would effectively screen out of the jury those veniremen who might thus be prejudiced, and the Criminal Term, likewise, noted that the "prejudices of the past have been tempered by the involvement of our clergymen in the now open citadels of public life" (*La Rocca v Lane*, 77 Misc 2d 123, 128, *supra*).

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A judicious use of the *voir dire* might well lead to the selection of a jury which would not be biased by the petitioner's appearance in clerical garb as attorney for the defendant. There is, of course, no guarantee that such would be the result. One study has come to the conclusion that "*voir dire* is grossly ineffective as a screening mechanism" (Broeder, Voir Dire Examination: An Empirical Study, 38 So Cal L Rev 503, 528). Jurors do not always admit their preferences or their actions (cf. Broeder, Occupational Expertise and Bias as Affecting Juror Behavior: A Preliminary Look, 40 NYUL Rev 1079; Comment, 70 Yale LJ, 763, 777).

It is unnecessary, however, to come to the extreme position that the veniremen would conceal their prejudices and thus frustrate the objective of a fair trial. A fair trial encompasses more than a fair jury; it includes the atmosphere and the appearance of a fair trial. "It is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done" (*Rex v Sussex Justices* [1924], 1 KB 256, 259; cf. *Cox v Louisiana*, 379 US 559, 565). "Preserving and enhancing respect for law is of surpassing importance in the administration of justice and the standards emphasize the pervasive obligation of the judge to maintain and safeguard both the reality and appearance of justice and respect for the law by his judicial conduct and utterances" (A.B.A. Project on Minimum Standards for Criminal Justice, The Function of the Trial Judge, Introduction [Tentative Draft], p 4).

The petitioner's attire at the trial would undoubtedly affect the witnesses and the spectators. Witnesses for the

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prosecution, especially the complaining witnesses, might question whether the scales of justice had not been tipped by the petitioner's presence. The location of a clergyman at the side of a complaining witness during the selection of a jury has been said to be an error on the part of the court (*People v De More*, 45 Misc 2d 872, 874). Dress is "a continuing visual communication to the jury" (*People v Roman*, 35 NY2d 978, 979) and to others in the courtroom as well, and it represents, when attached closely to a concept or mode of life, a symbolism which draws an appropriate response.[3] For this reason, state the American Bar Association Standards for Criminal Justice, The Prosecution Function [Approved Draft] (Commentary a. to §5.2, pp 113-114): "Certain standards of dress, decorum, manners and orderly procedure have evolved over the centuries to enhance the authority of courts and the status and authority of the advocates commensurate with their special offices and powers. Such standards also serve to insure calm, dispassionate consideration which places the focus on the evidence rather than personalities."[4]

The court's power to regulate dress cannot be unreasonably exercised. Whether counsel preferred a bow-tie to a

3. In *United States ex rel. Robson* v. *Malone* (412 F2d 848, 850) the symbolic rising on the entrance of the Judge into the courtroom was said to be sufficiently related to the functioning of the court as to constitute grounds for exclusion from the court of those spectators who objected to rising.

4. The Standards refer to the garb worn by counsel in England and Europe (*id.*, p 114). In England the gowns and wigs worn by barristers differ according to rank and gender (W. W. Boulton, Conduct and Etiquette at the Bar of England and Wales [4th ed., 1965], pp 80-81). Though the origin of the use of these articles doubtless stems from the common attire in the Middle Ages of student, clergy and public officials, they now serve the purpose of putting opposing counsel on a parity.

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four-in-hand, or a gray suit to a blue, in common experience should have no influence on the conduct of a trial. There are idiosyncrasies which are beyond the power of a court or even the strictures of a book of etiquette to correct. When, nonetheless, a discernible nexus between dress of an attorney and the attainment of a fair trial becomes evident in common experience, the court should take such action as will be reasonably adapted to regulate the dress of the attorney.

The court's order in this case was reasonably adapted to achieve the purpose of a fair trial. We take note that the petitioner's protest against the order was respectful and obviously sincere. His opposition took the form of vigorous argument before the court, couched in dignified language, and in the institution of a proceeding to review the court's ruling by other authority. Our concern, nevertheless, is not with what we consider to be the petitioner's motives, sincere as they are, but rather with the integrity of the judicial process. That process must envelop not simply the petitioner, but all who appear in court or come to see the proceedings, and all must be aware of the court's interest in conducting a fair and impartial trial.

For these reasons, we reverse the judgment, on the law, without costs, and dismiss the petition on the merits.

SHAPIRO, J. (dissenting). My sympathies are all with the majority in the position that it takes in this case and if I were free to disregard what I find to be the compelling requirements of the United States and New York State Constitutions, I would join in the opinion for reversal. However, while I agree with the majority that no con-

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stitutional right of the petitioner's client was violated by the direction of the Criminal Court that the petitioner remove his clerical collar as a condition of trying the charge against his client before the jury, I must reluctantly dissent from its conclusion that the direction violated no constitutional right of the petitioner.

Although the majority states that the petitioner claims that he is under instructions from his Bishop to wear his collar, and the record on appeal shows that he did make such a claim in his oral argument in the Criminal Court, his written papers in support of his article 78 application do not rely upon any claimed instructions from his Bishop but rest solely on the allegation that his wearing of the clerical collar at any public function is a continual act of worship and a symbol of his religious dedication and that his compliance with the Criminal Court's order to remove his clerical collar would offend his religious conscience and deny him his First Amendment right of free exercise of religion. Thus, the major issue raised by this record is whether the appellant's order that the petitioner remove his clerical collar as a condition of the court's permitting him to represent his client before a jury denies him his constitutionally guaranteed First Amendment right of free exercise of religion, which right is made applicable to the States by the Fourteenth Amendment (*Cantwell v Connecticut*, 310 US 296, 309).

If the answer be in the affirmative, we are faced with the consequent question of whether the limitations sought to be imposed on this constitutional right can be justified by a compelling State interest. Since the majority does not

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dispute the fact that the applicable Federal standard in such a case is that any incidental burden on the petitioner's right to free exercise of religion "must be justified by a compelling State interest in the regulation of a subject within the State's power to regulate", I shall not belabor that point.

The core of the question here presented, it seems to me, is answered in *Sherbert v Verner* (374 US 398, 403, 404), cited by the majority, where Mr. Justice BRENNAN, speaking for the court, said, "Plainly enough, appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a 'compelling state interest in the regulation of a subject within the State's constitutional power to regulate * * *' *NAACP v Button,* 371 US 415, 438. * * *

"Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the

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same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."

In *Wisconsin v Yoder* (406 US 205, 214) the court said: "It follows that in order for Wisconsin to compel school attendance beyond the eighth grade against a claim that such attendance interferes with the practice of a legitimate religious belief, it must appear either that the State does not deny the free exercise of religious belief by its requirement, or that there is a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."

So, too, in our case the State may not bar the petitioner from, or limit his right to, the practice of the law by compelling him, if he wishes to try a jury case, to abandon his pattern of conduct, in the exercise of his religious beliefs, of wearing his clerical collar whenever he appears in public. "Governmental imposition of such a choice" clearly would put on his free exercise of religion "the same kind of burden * * * as would a fine imposed against" him for his mode of worship (see *Sherbert v Verner, supra,* p 404).

But the majority, after conceding that the Federal standard requires it "to find that any incidental burden on the petitioner's exercise of religion must be justified *by a compelling State interest in the regulation of a subject within the State's power to regulate*", goes on to conclude that "a balancing of the particular values becomes, therefore, the mechanism whereby the constitutionality of the regulation is decided" (emphasis supplied). But the effect of the majority's substitution of a balancing test for the

compelling-State-interest test is tantamount to excising the latter standard. Under the compelling-State-interest test, even if there is a possibility that the practice enjoined might endanger the State's right to a fair trial, "it would plainly be incumbent upon the * * * [the appellant] to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights" (*Sherbert v Verner*, 374 US 398, 407, *supra*). Hence, when the majority seeks to apply the compelling-State-interest test by a process of balancing the competing values of the State's right to a fair trial against the petitioner's right to a free exercise of religion, without a prior determination of whether the preservation of the former in the circumstances of this case requires that the First Amendment right of the petitioner be infringed, it is, in fact, giving mere lip service to the applicable compelling-State-interest test established to make clear the preferred position of that First Amendment right and is applying a completely different test, in negation of the concededly applicable Federal standard.

Only if the majority could find as a fact, as it does not, that the record demonstrates the ineffectiveness of existing alternative methods for avoiding any potential bias on the part of members of the jury panel can the process of balancing the competing values of the conflicting rights be involved.

In this respect it must be noted that even though there is a compelling State interest on the part of the State to insure a fair trial in criminal cases both for the defense and the prosecution, this, standing by itself, cannot suffice to justify an infringement of the petitioner's First Amend-

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ment right to free exercise of religion. Thus, the court in *Sherbert* said (*supra,* p 406): "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation,' *Thomas v Collins,* 323 US 516, 530." Here, as in *Sherbert,* "no such abuse or danger has been advanced" (*supra,* p 407). The appellant concedes that all that his order sought to avoid was the *possibility* of bias. Neither the court which issued the order to the petitioner to divest himself of his clerical collar nor the prosecutor who objected to the petitioner's being allowed to wear his collar offered any proof of any prejudicial impact on the jury. Rather, the appellant argues only that his order was justified by the possibility that "the wearing of a clerical collar by a defense counsel before a jury *could be* improperly construed by it as an assertion of his client's innocence"; that what the court was attempting to do "was to take a *prophylactic measure* in order to insure that an extraneous element which might cause bias, either for the prosecution or the defense, would not reach the jurors" (emphasis supplied). The appellant nowhere endeavors to show that the possibility which moved him to limit the petitioner's free exercise of religion could not be adequately handled by the use of appropriate questioning of members of the jury panel in *voir dire* and by appropriate instructions to the jury.

The law is clear that the mere opportunity for prejudice raises no presumption that such prejudice exists (*Holt v United States,* 218 US 245, 251). Here, no evidence was

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offered to establish the existence of such bias, because the prospective jurors had not even been questioned as to whether they would be improperly influenced in determining the issues by reason of the petitioner's garb. Hence, *Sheppard v Maxwell* (384 US 333), cited by the majority, which involved a trial where the hippodrome atmosphere the trial court had permitted to develop had clearly resulted in jury bias, is inapposite. Nor can any claim be made that the petitioner's clerical collar was in any way inappropriate, unconventional, unsuitable, disturbing or distracting in the courtroom. Hence, *Matter of Peck v Stone* (32 AD2d 506) and *People ex rel. Karlin v Culkin* (248 NY 465), both of which sustained a court's power to require attorneys to maintain an atmosphere comporting with dignity, are also inapposite. I do not dispute the power of a trial court to control the behavior of attorneys before it to assure the observance of proper decorum. The question here, however, is whether, in pursuit of this goal, the court may use that power to deny an attorney his First Amendment right to free exercise of religion because it fears (without proof) that his exercise of that right might possibly have the effect of appealing to the bias of some of the jurors, even though there are other available means of avoiding that possibility, means which would reach the goal without infringing on the petitioner's First Amendment rights.

The majority quotes from *Matter of Peck v Stone* (32 AD2d 506, 508, *supra*) to the effect that "membership in the Bar is a privilege burdened with conditions and while certain conditions of conduct may be imposed by a Judge, the imposition of any such rule must bear a reasonable relationship to the contemporary conditions and ought to

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be imposed only after there is a reasonable foundation for the need of any rule." The inference is that since membership in the Bar is a privilege rather than a right, limitations imposed on its exercise will be sustained if they have a reasonable foundation, a test far less drastic than the compelling-State-interest test. But in *Sherbert v Verner* (*supra,* p 404) the Supreme Court of the United States, dealing with the same contention, there made with respect to the collection of unemployment insurance, said: "Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege."

While it is clear that an attorney may be required to make certain concessions as a condition of receiving the privilege of practicing law (see *Matter of Peters,* 250 NY 595; *People ex rel. Karlin v Culkin,* 248 NY 465, *supra; Matter of Goldstein,* 220 App Div 107; *Matter of New York County Lawyers Assn.* [*Roel*], 3 NY2d 224, app dsmd *sub nom. Roel v New York County Lawyers Assn.,* 355 US 604), this cannot suffice to sustain a claim that a court may use its supervising power over attorneys to infringe on their constitutionally protected right of free exercise of religion *without establishing the existence of a compelling State necessity for such action.*

In a further effort to support their conclusion, the majority makes a *de minimis* argument. First it stresses that this denial of the free exercise of religion will have

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little effect generally, since "there are few clergymen who practice law generally." But the issue is not whether few or many will suffer from a rule barring attorneys who are clerics from wearing their clerical garb when appearing for their clients before juries, but whether the rule has denied this respondent his constitutionally guaranteed right to free exercise of religion in the absence of the existence of a compelling State interest warranting a denial of that right. Secondly, the majority contends that the order attacked by the petitioner "has a minimal effect on the petitioner's conduct, for it is directed against him only when he tries cases before a jury and requires him only to doff his clerical collar." But the First Amendment forbids the State not only "to condition the availability of benefits [in this case the petitioner's right to wear his clerical garb whenever he appears in court as counsel for any party] upon this * * * [the petitioner's] willingness to violate a cardinal principle of * * * [his] religious faith" because it thereby "effectively penalizes the free exercise of * * * [his] constitutional liberties" (*Sherbert v Verner*, 374 US 398, 406, *supra*), but it also denies to the State the right to say what is a cardinal principle and what is a subordinate principle of the petitioner's religous faith (see *Board of Educ. v Barnette*, 319 US 624, 642).*

* In his opinion for the court in that case (p 642), Mr. Justice JACKSON said, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." If no official, including a Judge, may do so, he certainly is barred from ruling as to what is a cardinal principle of a person's religious faith and what is a subordinate principle which may be infringed by court order, without a previous valid finding that such infringement is justified by a compelling State interest in the regulation of a subject within the State's power to regulate.

In sum, the majority's conclusion, that the petitioner's rights under the First Amendment must yield to the directions of the court that he not wear his clerical collar when he appears before it to try a case before a jury, results from the adoption of a balancing standard which departs wholly from that which the majority concedes is the Federal standard required to be applied. I therefore respectfully dissent from the conclusion reached by the majority.

There is really no need, therefore, to discuss the final portion of the majority's opinion, which deals with the subordinate, and in my view irrelevant, question of whether the court's order was reasonable. A few words of comment on the views the majority expressed may, however, not be inappropriate. The majority concedes that "a judicious use of the *voir dire* might well lead to the selection of a jury which would not be biased by the petitioner's appearance in clerical garb as attorney for the defendant." In seeking to explain away this concession it belittles the effectiveness of the *voir dire* as a screening mechanism. The majority notes, without distinguishing the question of the effect of clerical garb worn by an attorney from any other questions probing for potential jurors' prejudices on other matters, that there is "no guarantee" that a *voir dire* would result in a bias-free jury. Thus, implicit in the majority's argument is a rejection of the entire process of *voir dire,* a step which, I am sure, the majority does not call for or support.

MARTUSCELLO and LATHAM, JJ., concur with HOPKINS, ACTING P.J.; SHAPIRO, J., dissents and votes to affirm the judgment, with an opinion.

Judgment of the Supreme Court, Kings County, entered April 24, 1974, reversed, on the law, without costs, and petition dismissed on the merits.

Appendix C

Opinion of Supreme Court, Kings County, Criminal Term

GUY MANGANO, J. This is an article 78 proceeding to review an order of a lower court Judge barring petitioner, while wearing his clerical collar as an ordained Roman Catholic priest, from representing a defendant in the selection of a jury and in the trial of a criminal proceeding. The basis of the lower court order is that "there would be a substantial danger that jurors would draw impermissible inferences in the defendant's favor as to her character and veracity"; that "[w]hile it can be assumed that most jurors would react favorably to petitioner if seen in a clerical collar, there is always the possibility that some reactions might be adverse" and that "long experience in the criminal justice system has established that irrationality and bigotry cannot always be eliminated; [so] that some prospective jurors * * * will fail to follow the court's instructions."

Petitioner alleges that, in over 24 years since his ordination, he has always worn his clerical collar in his everyday activities. He has appeared before the Character Committee, was sworn in as a member of the Bar, had tried nonjury actions, all, while wearing his clerical collar. Petitioner contends that the court's barring him from representing defendant in a criminal jury trial because of his clerical collar deprives him of his basic constitutional privileges; the right of free exercise of religion, and the right to practice law.

The lower court's order presents no complex issues of prevention of free exercise of religion, or of favoring a religion, or of misconduct of an attorney in appearing at court wearing distinctive, religious garb. The petitioner's dress is not claimed to be immodest, bizarre or an affront to the dignity of the court, or an attempt to obtain an unfair ad-

vantage in the selection of the jury (see *Matter of Peck* v. *Stone*, 32 A D 2d 506). There is thus, but one fundamental issue to be considered, namely: the authority of a presiding Judge to determine, as a matter of law, that the outerwear of an attorney, be it a clerical collar, skull cap, crucifix, star of David, or other religious or societal emblem or medallion, distinctive of his faith, or belief will so prejudice the state of mind of a jury panel as is likely to preclude it from rendering an impartial verdict.

Unfortunately, bias to a greater or lesser degree has existed since the memory of man. Recognition of that fact is found in the statutory safeguards of our judicial system. But to assume from outward trappings or from eminence of trial counsel, a bias that rebuts the presumption of a prospective juror's impartiality is to enter into the realm of speculation that leads to the disqualification of entire classes of people from jury service. It is a predetermination that a juror cannot lay aside his impression or opinion and render a verdict based solely on the evidence presented (see *People* v. *Genovese*, 10 N Y 2d 478). This is no new concept being expounded by this court.

In *Purple* v. *Horton* (13 Wend. 9, 22) Chief Judge Savage in 1834 speaking with prophetic vision, rhetorically asked, "Is it true that persons belonging to the same society * * * are *ipso facto* prejudiced in favor of every person belonging to the same society * * * so that they cannot decide a question of fact impartially between them and other persons? Whatever may have been the state of society in the days of *Finch* and of *Blackstone*, it is not so now."

Closer to the instant case is *Searle* v. *Roman Catholic Bishop of Springfield* (203 Mass. 493, 498) wherein a

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Roman Catholic Bishop was sued for alleged conversion of a wooden building, considered as personal property, situated on the land of the Roman Catholic Bishop of Springfield, a corporation holding title to the realty for the Roman Catholic Church. The ruling of the lower court that no person of the Roman Catholic faith should sit as a juror in that case was reversed as "it could not successfully be contended that holding the same religious belief as one of the parties, or affiliation with him in the same church, would disqualify a person from sitting as a juror in his case. The application of such a doctrine would be unjust and impracticable." To the same effect, see *Barton* v. *Erickson* (14 Neb. 164 [1883] wherein the Lutheran Church was involved, and *United States* v. *Eagan* (30 F. 608, 609 [1887]) wherein the court would not bar a juror "for the fact that a juror belonged to one party, and was a strong partisan * * * any more than a challenge on the ground that he belonged to one church, and was a strong and bigoted adherent of that church." Exclusion of entire classes of people from the jury on grounds of implied prejudice has not been favored by our courts nor may "bias or lack of impartiality of fairness * * * be inferred as a matter of law." (*People* v. *Reilly*, 71 Misc 2d 227, 229; *Hildreth* v. *City of Troy*, 101 N. Y. 234; *Fishbaugh* v. *Armour & Co.*, 185 F. 2d 541, cert. den. 342 U. S. 914).

The strength and confidence of a citizenry to render an impartial verdict is not weakened by the fact that a prospective juror had a prior opinion or an acquaintanceship with or dislike of a trial attorney or been a client of either of trial counsel. See *People* v. *Wolter* (203 N. Y. 484) and *People* v. *Genovese* (10 N Y 2d 478, *supra*) which held that the prior opinion of a juror was no bar; *Garland* v. *United*

States (182 F. 2d 801) where mere relationship to a prosecuting attorney was no bar; *Lane* v. *United States* (321 F. 2d 573, cert. den. 381 U. S. 920); *Carpintero* v. *United States* (398 F. 2d 488); *Daut* v. *United States* (405 F. 2d 312, cert. den. 402 U. S. 945) where being friends of or having attended law school together with the prosecuting attorney was no bar; *People* v. *McQuade* (110 N. Y. 284) where being a former client to trial counsel was no bar; *Bateman* v. *United States* (212 F. 2d 61) where the mere having of some prejudice against one of the attorneys was no bar; and *United States* v. *Nadaline* (471 F. 2d 340) where even relationship to the foreman of the jury was no bar. As was best summed up in *Peerless Ins. Co.* v. *Schnauder* (290 F. 2d 607, 610, cert. den. 368 U. S. 830) the fact that the three jurors involved were—"one * * * because he had known the attorney 'many many years'. Another had known him 'for some time' 'just as a friend.' The third knew him 'personally' 'quite a number of years' having 'met him at different occasions,' and at 'social functions' * * * were [nevertheless] improperly excused."

The qualifications of prospective jurors and the grounds for their discharge were fully set forth in chapter 6 of the Code of Criminal Procedure and thereafter and as reenacted with greater safeguards in title J of the Criminal Procedure Law. Both statutes provided, among other qualifications "a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the time" (CPL 270.20, subd. 1, par. [b], Code Crim. Pro., §376, subd. 2). The "'state of mind' referred to * * * as a ground of challenge for cause, means actual bias as contrasted to implied bias."

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(*People* v. *Prior*, 268 App. Div. 717, 721, affd. 294 N. Y. 405.) "Implied bias" under the old code was expressly limited by definition to only those cases set forth in subdivisions 1 through 8 of section 377. In the new Criminal Procedure Law the words "implied bias" were eliminated as the trend and rationale of decisional law is that unless the prospective juror lacks the specified statutory qualifications (listed in CPL 270.20), he cannot be barred from service upon speculative implications or assumptions of bias. Prejudice must, in fact, be shown and may not be presumed as a matter of law, and must be established as a demonstrable reality (*Dennis* v. *United States*, 339 U. S. 162; *United States* v. *Haynes*, 398 F. 2d 980, cert. den. 393 U. S. 1120; *Hildreth* v. *City of Troy*, 101 N. Y. 234, *supra*, and *People* v. *Reilly*, 71 Misc 2d 227, *supra*).

If the outward clerical collar or other symbol denoting religious faith and integrity be barred, then what test other than *voir dire* may be applied to a trial counsel in a local community who, despite the normal streetwear, is better known to the residents of the community for his much publicized meritorious work as a church leader and as a man of honesty and integrity? If *voir dire* is employed in one instance, it should be employed, with equal force, in the other. *Voir dire* is the very cornerstone of jury selection. To deny *voir dire*, its full significance is to relegate it to the category of a useless appendage, the coccyx of the law jury qualification and selection. "The statute makes elaborate provision for an impartial jury. * * * The law prescribes the qualifications of jurors. The court cannot add to or detract from them. It cannot itself select the jury, directly or indirectly. It cannot in its discretion, or

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capriciously, set aside jurors as incompetent, whom the law declares are competent, and thus limit the selection of the jury to jurors whose names may be left. If this is done a legal right is violated, for which an appellate court will give redress." (*Hildreth* v. *City of Troy*, 101 N. Y. 234, 239). "The *voir dire* * * * is an effective and practical method of resolving on a factual basis the otherwise debatable and speculative question whether a fair and impartial jury can be selected." (*United States* v. *Hoffa*, 156 F. Supp. 495, 500 [S. D. N. Y.]; see, also, *United States* v. *Dellinger*, 472 F. 2d 340, cert. den. 410 U. S. 970).

The concept of *voir dire* is so ingrained and protected in our law that in *State Bank of Beaver County* v. *Hollingshead* (82 Utah 416, 424-425) a trial court was not permitted to "peremptorily or for cause or bias * * * challenge or excuse a juror of its own motion. The right to challenge rests with the parties * * *. The fact that a juror sustains the relationship of a debtor or creditor, master or servant, partner or united in business, with either party does not disqualify the juror to act, but it gives the litigant the right to challenge for cause." (See, also, *State* v. *Royster*, 181 S. C. 269.)

As was stated by Mr. Justice Holmes in *Holt* v. *United States* (218 U. S. 245, 251 [1910]), "If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial *under the conditions of the present day.*" (Emphasis added.)

This court, in the context of *Irvin* v. *Dowd* (366 U. S. 717) and *Estes* v. *Texas* (381 U. S. 532), has considered the possible "psychological impact" upon a juror viewing, throughout the trial, an attorney garbed as a clergyman.

In the *Irvin* case there was a direct assault by the news media upon the entire community of 30,000 inhabitants. The extremes of repertorial conduct included interviewing on public streets and broadcasting the opinions of the local citizenry "as to petitioner's guilt [and] even as to what punishment he should receive" (p. 725); the continuous "barrage of newspaper headlines, articles, cartoons and pictures * * * unleashed against [defendant] during the six or seven months preceding his trial" (p. 725); "caused a sustained excitement and fostered a strong prejudice" (p. 726) so that the "psychological impact" on the jurors swayed the court in holding that the jurors' declaration of "impartiality can be given little weight." (p. 728).

In the *Estes* case, the court was presented with the effect of televising the entire trial and the "conscious and unconscious effect * * * [it] may have on the juror's judgment." (p. 545.) Little regard was given to the State's contention that the effects of televised proceedings "are for psychologists because they are purely hypothetical." (p. 550.) However, in denying the telecasting of the trial, the court was not concerned with bias but with other factors that prevented a fair trial, namely, the unusual publicity, the aura of a cause célèbre the impact on witnesses so that "some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly" (p. 547), distraction of jurors, and the ultimate buildup of a prejudicial unfair trial.

No emotional assault is here made upon any prospective juror. The presence of a clerical collar or a skull cap in our social milieu, in our political and governmental functions is no unusual phenomenon. The prejudices of the

past have been tempered by the involvement of our clergymen in the now open citadels of public life. We cannot nor may we build bars on an evanescent presumption to bias, presumably triggered by the sight of religious trappings. We may not indulge in an assumption that every jury panel will have members of a religious denomination who will violate their religious teachings and favor petitioner, despite the evidence presented. Nor, may we presume that every juror has an impenetrable wall of antagonism preventing fair consideration of the evidence as elicited.

To adopt the view that every jury panel will be biased as a matter of law is to condemn our entire society to bigotry and to deny *voir dire* its function that has been hallowed by precedent and statute.

Irrespective of the law in some foreign jurisdictions, this court finds no statutes or court rules that restrict a clergyman from being admitted to the Bar of the State of New York, or place limitations on his usual attire. There is no statutory presumption of prejudice against a religious collar, cloak, skull cap or other distinctive symbol of a religion or people. Without such legislative or judicial proscriptions, this court must hold that the lower court was without authority to bar petitioner from the trial court while wearing his clerical collar and to bar a client from retaining a clergyman, particularly "since this is a criminal case, the constitutional right of the accused to the assistance of counsel of his own choice reinforces this principle." (*Lefton* v. *City of Hattiesburg*, 333 F. 2d 280, 286.)

Accordingly, the petitioner's application is in all respects granted.

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Appendix D

Petition Filed in Supreme Court, Kings County, Seeking Prohibition

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

FATHER VINCENT LAROCCA, of Counsel to
WILLIAM GALLAGHER, Attorney-In-Charge,
The Legal Aid Society, Criminal Defense Division,
Petitioner,

For a Judgment Pursuant to CPLR Article 78

against

HON. MORGAN LANE, Judge of the Criminal Court
of the City of New York,
Respondent.

FATHER VINCENT LAROCCA, being duly sworn, deposes and says:

1. I am an attorney admitted to practice law in this state in 1973. I am employed by the Legal Aid Society's Criminal Defense Division and am presently assigned to the Society's Brooklyn Criminal Court office.

2. I was assigned by WILLIAM GALLAGHER, Attorney-in-Charge of the Criminal Defense Division, to represent

Petition Filed in Supreme Court, Kings County, Seeking Prohibition

Cecelia Daniels, whose case was scheduled for trial on January 7, 1974.

3. I am an ordained Roman Catholic priest and have been so for over twenty-four years. Since my ordination, I have regularly worn the clerical collar as part of my everyday activities. I wore the collar during more than thirteen years as a teacher; while preparing for a doctorate in American history, and other advanced degrees; while attending law school; when I appeared before the Character and Fitness Committee; when I was admitted to the bar; and at every court appearance I have made since that time.

4. Even before jury selection began in the Daniels case, respondent, Hon. Morgan Lane, the Judge of the New York City Criminal Court presiding on the case, ordered me to remove my clerical collar. I refused, and respondent thereupon prohibited me from representing Ms. Daniels during her scheduled trial by jury. (The transcript of that proceeding is appended hereto.) The case was adjourned to January 24, 1974, and respondent said he would not adjourn the case further even if his ruling forbidding a clerical collar were then being challenged in a higher court.

5. The wearing of the clerical collar at all public functions is a continual act of worship and a symbol of religious dedication. Removal of the clerical collar for an appearance before the jury would offend my religious conscience. Thus, respondent's order to me to remove the clerical

collar denies me my First Amendment right of free exercise of religion.

6. No previous application has been made in this or any other court for the relief herein requested.

WHEREFORE, petitioner prays that the Court issue an order prohibiting the respondent judge from requiring me to elect between my right to the free exercise of my religion by wearing a clerical collar and my right as an attorney to represent clients during trial by jury.

/s/ REVEREND VINCENT R. LAROCCA

VINCENT LAROCCA

Sworn to before me this
15th day of January, 1974

/s/ ROBERT HERMANN
Notary Public

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Appendix E

Verified Answer to Petition Filed in Supreme Court, Kings County, Seeking Prohibition

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

Index No. 860/1974

FATHER VINCENT LAROCCA, of Counsel to
WILLIAM GALLAGHER, Attorney-In-Charge,
The Legal Aid Society, Criminal Defense Division,
Petitioner,

For a Judgment Pursuant to CPLR Article 78

against

HON. MORGAN LANE, Judge of the Criminal Court
of the City of New York,
Respondent.

Respondent, for his answer to the petition herein by his attorney, LOUIS J. LEFKOWITZ, Attorney General of the State of New York, respectfully alleges:

1. Denies so much of paragraph "5" thereof as alleges that respondent's direction to petitioner to remove his clerical collar during jury cases denies petitioner's right of free exercise of religion pursuant to the First Amendment.

Verified Answer to Petition Filed in Supreme Court, Kings County, Seeking Prohibition

2. Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs "3", "6" and so much of "5" thereof, not heretofore denied.

As and for a First, Separate and Complete Defense

3. That the determination sought to be reviewed and annulled herein was within respondent's jurisdiction; was neither arbitrary, capricious, in violation of lawful procedure, affected by an error of law or an abuse of discretion.

As and for a Second, Separate and Complete Defense and by Way of Objection in Point of Law

4. The petition fails to state facts entitling petitioner to the relief sought.

WHEREFORE, it is respectfully requested that the petition be dismissed.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No.: 488-3394

Appendix F

Affidavit of Morgan Lane, Judge of Criminal Court of the City of New York, in Opposition to Petition

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS

FATHER VINCENT LAROCCA, of Counsel to
WILLIAM GALLAGHER, Attorney-In-Charge,
The Legal Aid Society, Criminal Defense Division,
Petitioner,

For a Judgment Pursuant to CPLR Article 78

against

HON. MORGAN LANE, Judge of the Criminal Court
of the City of New York,
Respondent.

STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

MORGAN LANE, being duly sworn, deposes and says:

I am a Judge of the Civil Court of the City of New York, assigned to sit in the Criminal Court of the City of New York, County of Kings and the respondent herein. I have personal knowledge of the facts of this proceeding and make this affidavit in opposition to the petition herein.

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Affidavit of Morgan Lane, Judge of Criminal Court of the City of New York, in Opposition to Petition

Prior to ascending the bench, I spent twenty years in private practice as a criminal defense attorney and fourteen as an assistant district attorney, during the last five of which I prosecuted homicide cases. In my nine years of service on the bench I have sat largely in the Criminal Court. I am therefore profoundly aware of the compelling necessity for fairness and the appearance of fairness on the part of the court and counsel for both sides in the trial of criminal cases. This is particularly so in cases to be tried before a jury. It was with this in mind that, upon objection by the Assistant District Attorney in charge of the part, I directed the petitioner not to appear in a clerical collar in the case of *People* v. *Cecilia Daniels,* Dkt. # K-324146, which was to have been tried before me in Jury Part I on January 7, 1974. As I shall demonstrate below, entire basis of my action was to carry out my sworn duty to conduct a fair and impartial trial.

It must be emphasized that neither petitioner's religious beliefs and practices are at issue in this matter. What is important is that if petitioner were permitted to represent a criminal defendant before a jury while wearing a clerical collar, there would be a substantial danger that jurors would draw impermissible inferences in the defendant's favor as to her character and veracity. Clergymen of all faiths justifiably enjoy the respect and esteem of the community. Their veracity and good character are assumed; their views treated with deference. It is no accident that when a character witness is needed or a letter to a court or probation officer urging leniency is to be

written, that defense counsel often turns to the subject's priest, minister or rabbi.

In the instant case, petitioner is representing a mother charged with an assault upon her child's teacher. I understand that in addition to the alleged victim, prosecution witnesses include other teachers and an assistant principal. Even if the defense is not seeking to counter balance the professional standing and esteem in which the public holds teachers and school administrators with a clergyman-advocate, this is likely to be the impression that jurors will get.

While it can be assumed that most jurors would react favorably to petitioner if seen in a clerical collar, there is always the possibility that some reactions might be adverse. As a judge it is my sworn duty to guard against this danger as well.

Petitioner suggests that we live in a sophisticated age; and that any prejudices for or against the clerical collar can be dealt with on an examination of prospective jurors and in the court's charge. However, wisdom coming from long experience in the criminal justice system has established that irrationality and bigotry cannot always be eliminated; that some prospective jurors lie and some will fail to follow the court's instructions. A more effective means of assuring that extraneous matters involving this case will not prejudice the trial of Mrs. Daniels is for petitioner not to wear a clerical collar while engaged on this case. In an analysis of this matter, the court wonders what the reaction of the Legal Aid Society would be if an assistant

Affidavit of Morgan Lane, Judge of Criminal Court of the City of New York, in Opposition to Petition

district attorney, who, coincidentally was a clergyman, wore a clerical collar while prosecuting cases before a jury.

Finally, I should note that *People* v. *Daniels* has been adjourned to January 21, 1974. This matter has been on the calendar for some time, having been marked peremptorily against both sides. Accordingly, I ask that in the interests of justice, this proceeding be determined without delay.

WHEREFORE, it is respectfully requested that the temporary restraining order heretofore granted be vacated and the petition dismissed.

/s/ MORGAN C. LANE

MORGAN LANE

Sworn to before me this
17th day of January, 1974

/s/ ROBERT F. HAMMER
Assistant Attorney General
of the State of New York

Supreme Court, U. S.
FILED
MAR 2 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1025

FATHER VINCENT LAROCCA, of Counsel to WILLIAM GALLAGHER, Attorney-In-Charge, The Legal Aid Society, Criminal Defense Division,

Petitioner,

against

HON. MORGAN LANE, Judge of the Criminal Court of the City of New York,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1025

FATHER VINCENT LAROCCA, of Counsel to WILLIAM GALLAGHER, Attorney-In-Charge, The Legal Aid Society, Criminal Defense Division,

Petitioner,

against

HON. MORGAN LANE, Judge of the Criminal Court of the City of New York,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

Opinions Below

The opinion of the New York Court of Appeals is reported at 37 N Y 2d 575, 338 N.E. 2d 606 and 376 N.Y.S. 2d 93; it is reproduced as Appendix A to the petition. The opinion of the Appellate Division of the Supreme Court, Second Department is reported at 47 A D 2d 243 and 366 N.Y.S. 2d 456; it is reproduced as Appendix B to the petition. The opinion of the Supreme Court, Kings County is reported at 77 Misc 2d 123 and 353 N.Y.S. 2d 867; it is reproduced as Appendix C to the petition.

Jurisdiction

The judgment of the Court of Appeals of the State of New York was entered on October 23, 1975. The petition for certiorari was filed on January 19, 1976. Petitioner seeks to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3).

Questions Presented

1. May a state judge, in the exercise of his discretion for the purpose of insuring a fair trial, prevent an assigned defense counsel who is also a clergyman from representing his client before a jury while wearing clerical dress?

2. Is a criminal defendant, represented by a public defender organization by assignment of the court, entitled, as a matter of constitutional right, to be represented by a particular attorney in that office?

Constitutional Provisions Involved

The Constitution of the United States provides in pertinent part:

> Amendment I: "Congress shall make no law respecting the * * * free exercise [of religion]."
>
> Amendment VI: "In all criminal prosecutions, the accused shall * * * have the Assistance of Counsel for his defense."
>
> Amendment XIV: "* * * nor shall any state deprive any person of life, liberty, or property, without due process of law * * *".

Statement of the Case

Petitioner, an ordained Roman Catholic priest for approximately twenty-five years, was admitted to the New York bar in 1973. Employed by the Legal Aid Society in its Criminal Defense Division, petitioner was assigned to represent one Cecelia Daniels, accused in the Criminal Court of the City of New York, Kings County, of assaulting her child's school teacher (A2).* The charge, a Class A misdemeanor, carrying a maximum penalty of one-year's imprisonment, N.Y. Penal Law §§ 70.15(1), 120, was thus triable by a jury, *Baldwin* v. *New York,* 399 U.S. 66 (1970).

On January 7, 1974, the case was about to be tried before respondent and a jury when the assistant district attorney objected to proceeding while petitioner was wearing clerical dress. The prosecutor urged that petitioner's clerical collar might prejudice a juror either in favor or against the defendant.

Petitioner contended that he was under instructions from his religious superiors to wear clerical dress; that he had always dressed in this manner throughout law school, before the Committee on Character and Fitness, at his admission to the bar and at all previous court appearances. Admittedly, the *Daniels* case was the first in which he was to appear before a jury, *ibid.,* and the record is silent as to whether petitioner ever consulted his bishop as to whether his instructions could be waived for such a contingency (A11-12). In any event, petitioner contended that it would be a denial of his right to free exercise of religion to be forced to appear other than in clerical dress as well as a denial of his client's right to be represented by counsel of her choice (A2-3).

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* Numbers in parentheses preceded by capital letters refer to pages of the appendices to the petition.

Respondent nevertheless sustained the objection (A3, F2-4). In so doing he drew on his twenty years' experience as a criminal defense attorney in private practice, fourteen years as an assistant district attorney and nine years on the bench, for the most part sitting in the Criminal Court (F2).

Petitioner then instituted this proceeding pursuant to N.Y. Civil Practice Law & Rules, Article 78, to prohibit respondent from interfering with the manner of his dress. The Supreme Court, Kings County, granted his application (Pet. Appendix C). However, the Appellate Division reversed (Pet. Appendix B) and the Court of Appeals affirmed the Appellate Division (Pet. Appendix A), holding that neither petitioner's right to the free exercise of religion (A9-12) nor his client's right to counsel (A8) had been abridged.

Reasons for Denying the Writ

A.

The "free exercise" issue raised by this case is of limited practical significance. The number of active members of the bar who are also clergymen is obviously small. An even smaller number are (1) engaged in criminal defense and (2) would, even if permitted, appear as counsel before a jury in distinctive clerical dress. Thus, at the threshold, this case fails to present itself as one of general importance warranting the exercise of this Court's certiorari jurisdiction, S.Ct. Rules, Rule 19(1)(a).

Moreover, this case is moot. The judgment reviewed by the State appellate courts directed respondent to permit petitioner to appear before a jury in clerical dress in a particular case, viz., *People* v. *Cecelia Daniels*.* Re-

* The pertinent decretal provision reads as follows:

"ORDERED AND ADJUDGED that the respondent is prohibited from requiring petitioner to remove his clerical collar while

(footnote continued on following page)

spondent was and is a judge of the Civil Court of the City of New York, sitting in the Criminal Court by assignment of the Appellate Division, N.Y. Const., Art. VI, §§ 15, 26(g). Since the commencement of these proceedings, respondent has returned to duty in the Civil Court. When the *Daniels* case is finally tried (A3), respondent will not be sitting. Another unknown judge's attitude toward an attorney appearing in clerical dress is obviously speculative; equally so the likelihood of recurrence of this issue, *Golden* v. *Zwickler*, 394 U.S. 103, 109-110 (1969); cf. *Rosario* v. *Rockefeller*, 410 U.S. 752, 756, f.n. 5 (1973).

B.

Petitioner's claim that he is entitled, as a matter of free exercise of religion, to wear clerical dress while functioning as an attorney-at-law before a jury,** is entirely too insubstantial to warrant plenary review by this Court.

The First Amendment right to free exercise of religion is not absolute and may be restricted by the state, even if only upon a showing of a compelling state interest, *Wisconsin* v. *Yoder*, 406 U.S. 205, 220 (1972); see also: *Sherbert* v. *Verner*, 398 U.S. 402 (1963); *Cleveland* v. *United States*, 329 U.S. 14, 19 (1946); *Prince* v. *Massachusetts*, 321 U.S. 158, 166-167 (1944) and *Reynolds* v. *United States*, 98 U.S. 145, 146 (1878).

New York's compelling interest in assuring a fair trial cannot be denied. The Court of Appeals articulated it

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acting as defense counsel in the jury trial of *People* v. *Cecelia Daniels*, Docket No. K-324146."

** This is the only First Amendment claim properly before the Court. From its inception, this case was treated by all parties and by all of the State courts as involving "free exercise", (A1, 8 et seq; B4-8, C1, D3, and F2). The issues of alleged "establishment of religion", pet. p. 10 and "freedom of expression" have been belatedly raised for the first time in the petition for certiorari, see *Ellis* v. *Dixon*, 349 U.S. 458, 460 (1955); *Beck* v. *Washington*, 369 U.S. 541, 549-553 (1962).

as follows:

> "Primary, of course, in a criminal action, is the right of both the defendant and the People to a fair and impartial trial. Indeed, a fair trial is a paramount constitutional condition in any judicial proceeding; it is the foundation of a criminal trial, if justice be its essence" (A9).

The Sixth and Fourteenth Amendment rights to a fair trial are of such importance that this Court has favored them over another First Amendment right: the right to freedom of the press, see e.g. *Shepherd* v. *Maxwell,* 384 U.S. 333, 356 et seq. (1966); *Estes* v. *Texas,* 381 U.S. 532, 539 (1965).

Moreover, as a member of the bar and as counsel for the defendant in this particular case, petitioner was subject to the disciplinary authority of the courts, *In re Griffiths,* 413 U.S. 717, 727 (1973). It is generally understood that the courts' authority over attorneys extends to dress and appearance to the extent necessary to maintain court decorum, *People ex rel. Karlin* v. *Culkin,* 248 N.Y. 465, 473, 477; 162 N.E. 487, 489-490 (1928); *Matter of Peck* v. *Stone,* 32 A D 2d 506, 507-508, 304 N.Y.S. 2d 881, 884-885 (4th Dept. 1969); *Sandstrom* v. *State of Florida,* 390 S. 2d 17, 22 Fla. App. 1975). This Court in its instructions to counsel prescribes "conservative business dress" as the appropriate attire for attorneys appearing before it. Petitioner himself has cited, pet. p. 11, this Court's decision which holds that dress and appearance are a form of communication, *Tinker* v. *Des Moines School District,* 393 U.S. 503, 505 (1969).

Under the circumstances of this case, in view of the esteem in which the clergy are generally held (A10-11) and because a clergyman's character testimony or recommendation to courts and probation officers is often given (F2-3), respondent correctly concluded that petitioner's appear-

ance as counsel for a defendant while in clerical dress might be taken by a juror as an improper assertion by counsel of his client's innocence, see A.B.A. Code of Prof. Resp., DR 7-106(c)(3)(4). A clerical collar stands out in a courtroom, and will make an impression upon a trier of the facts, even in a non-jury case, *People* v. *HST Meth, Inc.*, 74 Misc 2d 920, 921, 346 N.Y.S. 2d 146, 148 (Sup. Ct., N.Y. Co., 1973), affd. 43 A D 2d 932, 352 N.Y.S. 2d 487 (1st Dept., 1974). Cf. *People* v. *DeMore*, 45 Misc 2d 872, 258 N.Y.S. 2d 10 (App. Term, 2d Dept., 1965) like the instant case, a third degree assault charge in which the Court held:

> "it was an improvident exercise of discretion to permit a member of the clergy to sit alongside the complaining witness while the jury was being impanelled in this type of case when all other witnesses were excluded. It gave an air of credence and respectability to anything the complainant might thereafter say and was prejudicial to the defendants." 45 Misc 2d at 874, 258 N.Y.S. 2d at 12.

Respondent was entitled to employ an effective remedy in carrying out his responsibility to assure a fair trial, *Rosario* v. *Rockefeller, supra*, 410 U.S. at 762, fn. 10. His action was clearly secular in scope and in no way interfered with religious services or petitioner's freedom of belief, *Gillette* v. *United States*, 410 U.S. 437, 462 (1971). Thus, any interference with the free exercise of religion was minimal and necessary in the interest of justice, *Wisconsin* v. *Yoder, supra.*

C.

The claim of denial of effective assistance of counsel advanced by petitioner on behalf of his assigned client is frivolous.

The right of an indigent defendant to assigned counsel, *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972); *Gideon* v. *Wain-*

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wright, 372 U.S. 335 (1963) does not include the right to dictate to the Court the choice of such counsel. The decisions of this Court reflect the understanding that where counsel is to be appointed, the choice lies within the prerogative of the court, *Crooker* v. *California,* 357 U.S. 433, 439 (1958); *Dennis* v. *United States,* 340 U.S. 887 (1950) FRANKFURTER, J., concurring. In rebuffing petitioner's argument that his assigned client was entitled to his particular services (A8), the Court of Appeals applied a rule followed throughout this country, both in the state and federal courts, *People* v. *Brabson,* 9 N Y 2d 173, 180-181; 173 N.E. 2d 227, 231; 212 N.Y.S. 2d 401, 407 (1961); cert. den. 369 U.S. 879 (1962); *United States ex rel. Baskerville* v. *Deegan,* 428 F. 2d 714, 716 (2d Cir.); cert. den. 400 U.S. 928 (1970); *United States* v. *Young,* 482 F. 2d 993, 995 (5th Cir. 1973).

It is conceded by petitioner, pet. p. 12, that if he were forced by his religious beliefs to withdraw as Mrs. Daniels' counsel, she would not remain unrepresented. Her attorneys of record are the Legal Aid Society, the largest public defender organization in the world, *People* v. *Wilkins,* 28 N Y 2d 53, 56; 268 N.E. 2d 756, 758; 320 N.Y.S. 2d 8, 11 (1971). Petitioner is not the only Legal Aid Society attorney who could offer Mrs. Daniels an effective defense.

Thus, no further review of this issue is necessary.

CONCLUSION

Certiorari should be denied.

Dated: New York, New York, February 27, 1976.

Respectfully submitted,

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